

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND SHAW and	:	CIVIL ACTION
BARBARA SHAW	:	
	:	
v.	:	
	:	
THRIFT DRUG, INC., trading as	:	
ECKERD DRUGS and J.C. PENNEY	:	
PROPERTIES, INC.	:	NO. 98-5170

MEMORANDUM AND ORDER

BECHTLE, J.

NOVEMBER , 1999

Presently before the court is defendants Thrift Drug, Inc.'s, trading as Eckerd Drugs ("Thrift Drug"), and J.C. Penney Properties, Inc.'s ("J.C. Penney") (collectively "Defendants") motion for summary judgment and plaintiffs Raymond and Barbara Shaw's ("Plaintiffs") response thereto. For the reasons set forth below, the court will grant the motion.

I. BACKGROUND

Plaintiffs bring this claim against Defendants based on Plaintiff Raymond Shaw's ("Shaw") tripping over a bolt attached to an angle iron within a warehouse owned by J.C. Penney and occupied by and leased to Thrift Drug. In mid-September 1996, Shaw began work loading trucks by hand at the warehouse occupied by Thrift Drug. Shaw was placed at the Thrift Drug warehouse by American Staffing Resources, Inc. ("American"), a provider of temporary workers. On September 25, 1996, Shaw allegedly tripped on a bolt at the warehouse and sustained the injuries for which he now claims.

Plaintiffs instituted their action in the Court of Common Pleas of Philadelphia County. Subsequently, the action was removed here based on diversity of citizenship.¹ The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332. Plaintiffs allege that Defendants were negligent in failing to correct or warn Shaw of the condition which caused his fall. Shaw seeks recovery for personal injuries. His wife, Plaintiff Barbara Shaw, seeks recovery for loss of services, companionship and consortium. On May 10, 1999, Defendants filed the instant motion for summary judgment.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

¹ By Order dated December 4, 1998, the court denied Plaintiffs' motion to remand this action back to state court. The court found that the requirements of 28 U.S.C. § 1332 were met in that the parties were of diverse citizenship and that the amount in controversy exceeded \$75,000. District courts have jurisdiction over cases between citizens of different states when the amount in controversy is in excess of \$75,000. 28 U.S.C. § 1332.

On a motion for summary judgment, the non-moving party has the burden to produce evidence to establish prima facie each element of its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Such evidence and all justifiable inferences that can be drawn from it are to be taken as true. Anderson, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of its claim, the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322-23.

III. DISCUSSION

Defendants assert two principal grounds in support of their motion for summary judgment. First, J.C. Penney asserts that it was a landlord out of possession and is not liable for Shaw's injuries. Second, Thrift Drug asserts that it is immune from liability under the Pennsylvania Worker's Compensation Act because Shaw was an employee of Thrift Drug at the time of his fall. The court will address each argument separately.

A. Liability of J.C. Penney

Defendants assert that J.C. Penney is not liable because it is a landlord out of possession. Plaintiffs do not oppose this aspect of Defendants' motion for summary judgment. (Pls.' Resp. to Mot. for Summ. J. at 1 (stating that J.C. Penney "correctly claims that it was a landlord out-of-possession and is not liable for Shaw's damages").) Under Pennsylvania law, the general rule is that "a landlord out of possession, in most instances, is not responsible for injuries suffered by third

parties on the leased premises." Kobylinski v. Hipps, 519 A.2d 488, 491 (Pa. Super. Ct. 1986). Although there are exceptions to this general rule, Plaintiffs do not assert, and the court does not find, that the circumstances presently before the court fit any of them. See id. (listing instances where liability attached to landlord out of possession). Thus, the court finds that no genuine issues of material fact exist with respect to J.C. Penney's status as a landlord out of possession. Accordingly, the court will grant summary judgment in favor of Defendants on this ground.

B. Liability of Thrift Drug

Defendants assert that Thrift Drug is immune from liability under the Pennsylvania Worker's Compensation Act because Shaw was an employee of Thrift Drug at the time he allegedly sustained his injuries. Plaintiffs assert that Thrift Drug is not immune under the Pennsylvania Worker's Compensation Act because Shaw was an employee of American at the time he allegedly sustained his injuries.

Under the Pennsylvania Worker's Compensation Act, the "liability of an employer under this act shall be exclusive and in place of all other liability" to its employees.² 77 Pa. Stat.

² An "employer" under the Act is defined as "synonymous with master, and [includes] natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it." 77 Pa. Stat. Ann. § 21. An "employee" under the Act is defined as "synonymous with servant, and includes . . . [a]ll natural persons who perform services for another for a valuable consideration." 77 Pa. Stat.

Ann. § 481. Under Pennsylvania law, the "law governing the 'borrowed employee' is well established." JFC Temps, Inc. v. Workmen's Compensation Appeal Bd., 680 A.2d 862, 864 (Pa. 1996).

The Pennsylvania Supreme Court has stated that:

[t]he test for determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done but also as to the manner of performing it. The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised. Other factors which may be relevant include the right to select and discharge the employee and the skill or expertise required for the performance of the work. The payment of wages may be considered, but is not a determinative factor. Although the examination of these factors guides the determination, each case must be decided on its own facts.

Id. (citations omitted).

The evidence marshaled by the parties, viewed in the light most favorable to the Plaintiffs, is as follows. Before his fall, Shaw applied for employment with American, a provider of temporary workers. American then assigned Shaw to work at Thrift Drug. Shaw stated that American told him he would be loading trucks at Thrift Drug, but did not train him in any way. (Defs.' Mot. for Summ. J. Ex. G, at 12.) American provided Thrift Drug with workers pursuant to a written agreement. (Pls.' Resp. to Mot. for Summ. J. Ex. A.) The agreement specifically

Ann. § 22.

provided that Shaw was "an employee of American and shall not be deemed to be [Thrift Drug's] employee." Id. The agreement also required American to provide worker's compensation insurance. Id. Once he started working at Thrift Drug, Shaw stated that he had no contact with American. (Defs.' Mot. for Summ. J. Ex. G, at 45.)

In responding to discovery requests, Shaw admitted the following regarding all times material to this action: (1) that Thrift Drug solely determined the type of work to be performed by Shaw; (2) that Thrift Drug dictated the manner in which Shaw's work was to be performed (although he controlled the manner in which he performed); (3) that Thrift Drug supervised Shaw; (4) that Thrift Drug set Shaw's work schedule; (5) that Thrift Drug had control over the duties and responsibilities of Shaw; (6) that Thrift Drug directed Shaw as to the type of work he was to perform (subject to the limitation that he was to perform only as a forklift operator and as prescribed by American); and (7) that Thrift Drug directed the manner in which Shaw was to perform his job. (Defs.' Mot. for Summ. J. Exs. E & F, correspondingly at ¶¶ 1, 2, 3, 6, 9, 11 & 12.) In addition, Shaw stated that when he arrived at Thrift Drug, Mr. Werts, an employee of Thrift Drug, took him to a loading platform and that two other Thrift Drug employees told Shaw what he would be doing. (Defs.' Mot. for Summ. J. Ex. G, at 33.) Shaw was told to take boxes off a pallet and throw them onto a truck. Id. at 34. Other Thrift Drug employees instructed Shaw on how to load the truck.

Specifically, Shaw was told to "make it look neat, and put the heaviest stuff on the bottom . . . and put the light stuff on the top, and when a store was completed . . . to take these pieces of plywood and put them up as a gate and start loading up again with the heavy stuff on the bottom and light stuff on the top. That was a separation for stores." Id. at 37.

Additionally, Donald Jennings ("Jennings"), Shaw's supervisor at Thrift, stated that he called American, asked for a temporary employee and gave requirements for the job to be filled. (Defs.' Mot. for Summ. J. Ex. H, at 39.) American then sent him Shaw. Id. Jennings stated that Shaw reported to him, that he supervised Shaw, that he decided what activity Shaw would be doing and that he evaluated Shaw's performance. Id. at 39-40. Jennings also stated that a Thrift Drug shipping associate trained Shaw and that American had no supervisory personnel at the Thrift Drug location. Id. at 40. Furthermore, Jennings stated that he had a right to terminate Shaw's employment at Thrift Drug by sending Shaw home and calling American to tell it that Shaw was no longer needed. Id. at 45.

Based on this evidence, the court finds that Shaw was an employee of Thrift Drug under the Pennsylvania Worker's Compensation Act. The evidence before the court indicates that Thrift Drug possessed the right to control the manner of performance of Shaw's work. See JFC Temps, 680 A.2d at 864 (stating test for determining whether servant furnished by one to another becomes employee of person to whom he is loaned). Shaw's

own admissions and deposition testimony show that Thrift Drug directed the manner in which he loaded trucks. Furthermore, the deposition testimony of Jennings indicates that Thrift Drug supervised and evaluated Shaw.

Plaintiffs argue that American's contract with Thrift Drug "takes this case out of the traditional 'borrowed' employee situation." (Pls.' Resp. to Mot. for Summ. J. at 3.) However, American's provision of benefits, wages and insurance on behalf of Shaw is not dispositive here. See JFC Temps, 680 A.2d at 684 (stating that payment of wages is not determinative factor); Supp v. Erie Ins. Exch., 479 A.2d 1037, 1041 (Pa. Super Ct. 1984) (stating that "the fact that the 'lending employer' pays for Workmen's Compensation insurance is no impediment to finding the 'borrowing employer' to be immune from suit").

Plaintiffs also rely on Accountemps v. Workmen's Compensation Appeal Bd., 548 A.2d 703 (Pa. Commw. Ct. 1988). In Accountemps, the court held that a lending employer was the responsible "employer" under the Workmen's Compensation Act because the employee already possessed the requisite skill and did not have to be instructed on how to perform her basic job. Id. at 706; but see Bacon v. Tucker, 564 A.2d 276, 279 (Pa. Commw. Ct. 1989) (holding that Accountemps decision did not apply in case involving employee not in possession of skill or special training required for temporary assignment). Thus, Plaintiffs argue that because Shaw received no special training from Thrift Drug, he cannot be considered their employee. The court

disagrees and finds that this case is more akin to JFC Temps. In JFC Temps, the court held that although a borrowing employer did not have to train an employee regarding the operation of a tractor trailer, the borrowing employer did direct the employee as to the specifics of the deliveries to be made. 680 A.2d at 865. In addition, the employee reported to the borrowing employer daily and performed miscellaneous odd jobs under the borrowing employer's direction. Id. Furthermore, personnel of the lending employer were never present at the borrowing employer's worksite and although the lending employer paid the employee, the borrowing employer evaluated his performance. Id.

Like the circumstances in JFC Temps, although Thrift Drug did not necessarily have to train Shaw on how to load a truck by hand, it did direct him as to the specifics of the job. (Defs.' Mot. for Summ. J. Ex. G, at 33-34.) In addition, Shaw reported to Thrift Drug daily and was supervised by Thrift Drug. (Defs.' Mot. for Summ. J. Exs. E, F, G & H.) In fact, Shaw had no contact with American once he started working at Thrift Drug. (Defs.' Mot. for Summ. J. Ex. G, at 45.) Furthermore, although Shaw was paid by American, he was evaluated by Thrift Drug. (Defs.' Mot. for Summ. J. Ex. H, at 39-40.)

In sum, while some factors, such as payment of wages and workers compensation insurance, lean in favor of finding that American was Shaw's employer, when viewed in consideration of the overriding factor, the right to control the performance of the work, the court finds that Thrift Drug is the responsible

employer. See JFC Temps, 680 A.2d at 865 (stating that notwithstanding fact that some factors favored finding lending employer responsible, fact that borrowing employer controlled performance of work was overriding factor); English v. Lehigh County Auth., 428 A.2d 1343, 1349-50 (Pa. Super Ct. 1981) (same). Accordingly, the court finds that Thrift Drug is immune from liability under the Pennsylvania Worker's Compensation Act because Shaw was an employee of Thrift Drug at the time of his fall, and thus, it will grant summary judgment in favor of the Defendants on this ground.³

IV. CONCLUSION

For the foregoing reasons, the court will grant Defendants motion for summary judgment.

An appropriate Order follows.

³ Because the court will grant summary judgment in favor of Defendants, it will deny as moot their Motion to Compel Production of Records from Legion Insurance Company.

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THRIFT DRUG, INC., trading as	:	
ECKERD DRUGS and J.C. PENNEY	:	
PROPERTIES, INC.	:	NO. 98-5170

ORDER

AND NOW, TO WIT, this day of November, 1999, upon consideration of defendants Thrift Drug, Inc.'s, trading as Eckerd Drugs, and J.C. Penney Properties, Inc.'s motion for summary judgment and plaintiffs Raymond and Barbara Shaw's response thereto, IT IS ORDERED that said motion is GRANTED. Judgment is entered in favor of defendants Thrift Drug, Inc., trading as Eckerd Drugs, and J.C. Penney Properties, Inc. and against plaintiffs Raymond and Barbara Shaw.

IT IS FURTHER ORDERED that Defendants' Motion to Compel Production of Records from Legion Insurance Company is DENIED AS MOOT.

LOUIS C. BECHTLE, J.